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No. 71-130

# In the Supreme Court of the United States

OCTOBER TERM, 1971

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PACIFIC WESTBOUND CONFERENCE AND FAR EAST CONFERENCE, PETITIONERS

*v.*

FEDERAL MARITIME COMMISSION, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 440 F.2d 1303. The order and opinion of the Federal Maritime Commission (Pet. App. 27a-69a) are reported at 8 F.M.C. 553.

### JURISDICTION

The judgment of the court of appeals was entered on March 19, 1971, and a petition for rehearing was

denied on April 28, 1971. The petition for a writ of certiorari was filed on July 26, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

## QUESTIONS PRESENTED

1. Whether petitioners were prejudiced by the Commission's application of a standard not articulated in past cases as an alternative basis for finding a violation of Section 15 of the Shipping Act.

2. Whether the court of appeals' decision here conflicts with its later decision upholding unfiled agreements among individual conferences serving the Pacific Coast which permit independent setting of overland rates.

## STATUTE INVOLVED

Section 15 of the Shipping Act of 1916, 39 Stat. 733, as amended, 46 U.S.C. 814, is set forth at Pet. App. 72a-74a.

## STATEMENT

Petitioners are shipping conferences, each with a membership of approximately 20 shipping lines, which compete in the carriage of goods between the United States and the Orient (Pet. App. 4a).[1] Pa-

[1] A shipping conference is an association of ocean carriers which has as its principal function defining the trade area to be served by its members and establishing the trade rates in that area. Each petitioner operates under a conference agreement which has been approved by the Commission pursuant to Section 15 of the Shipping Act: Pa-

cific Westbound's members operate out of ports on the Pacific Coast, while Far East's members operate out of Gulf and Atlantic ports. Both serve essentially the same destinations in the Orient.[2] Each conference was formed in the early 1920's, and, with the exception of a joint conference agreement which lasted from 1925 to 1930, they made rates separately and competitively for the next thirty years (Pet. App. 4a). In 1952, the parties again entered into a joint agreement, Agreement No. 8200, which was approved by the Federal Maritime Commission under Section 15 of the Shipping Act.[3]

Agreement No. 8200[4] provided that promptly after Commission approval the parties would hold an initial meeting to make rules "* * * for the conduct of all meetings * * * and for the transaction of such other business as the parties may be permitted to conduct by virtue [t]hereof, including the provision of the machinery for the change of any rates, rules or regulations adopted at the initial meeting or at any

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cific Westbound under Agreement No. 17, approved November 14, 1922; Far East under Agreement No. 57, approved January 1, 1923 (Pet. App. 3a-4a).

[2] The one exception is Thailand which Pacific Westbound alone serves (Pet. App. 68a).

[3] The Federal Maritime Commission came into existence in 1961 under Reorganization Plan No. 7, 75 Stat. 840; it took over the functions performed by its predecessor, the Federal Maritime Board. All references to the "Commission" refer to any of the Commission's predecessors where the sense of the sentence so requires.

[4] The full text of Agreement No. 8200, approved December 29, 1952, is set forth in the margin of the court of appeals' opinion (Pet. App. 7a-11a, n. 2).

subsequent meeting" (Pet. App. 9a). At the initial meeting action could be taken only by concurrence of each conference acting as a group (Pet. App. 8a-9a). The Agreement specifically reserved to each conference for the duration of the agreement the right of independent action to change tariffs, subject only to notice (Pet. App. 9a).[5]

On October 26, 1959, the Commission ordered an investigation to determine whether Agreement No. 8200 constituted the full and true agreement between petitioners and whether the agreement, or the manner in which the parties implemented it, violated the Shipping Act (Pet. App. 28a). A full evidentiary hearing, held pursuant to that order, disclosed that, in meetings held after the Commission's approval of Agreement No. 8200, petitioners had made additional agreements concerning rate-making which they had never filed with the Commission for Section 15 approval (Pet. App. 15a). These subsidiary agreements related to cargo which moved to the Orient from one of three "territories" within the United States: one territory "local" to each petitioner, and an "overland" territory (Pet. App. 36a, 38a).[6]

At a meeting held in January 1953, petitioners had agreed that they would continue to establish rates for cargo coming from the overland territory but

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[5] Other provisions of the Agreement dealt with admission of new parties, modes of notice, bearing of meeting costs, and duration (Pet. App. 10a-11a).

[6] Each conference had as local territory the coastal states which it served, while overland territory was comprised of the states not local to either conference (Pet. App. 64a-65a).

would make no change in the differentials that had previously existed between them (Pet. App. 38a, 67a).[7] With respect to goods shipped from the respective local territories, they had agreed to classify such goods as either "local initiative" cargo or "local competitive" cargo (Pet. App. 34a, 36a, 65a). The "local initiative" label was placed on a commodity if at least 70 percent of the combined total of that commodity from both local territories was shipped annually by one conference (Pet. App. 36a, 65a); that conference was then entitled to put the commodity on its initiative list, provided it first obtained the consent of the other conference. All commodities not appearing on the initiative lists of the two conferences came within the category of "local competitive" cargo.

From 1953 to 1956, the arrangements in effect between petitioners provided that the conference having an item on its initiative list could initiate a rate change on that commodity independently. After 1956, the concurrence of the other conference was required

[7] The differentials in ocean rates applicable to shipments originating in the overland territory date back many decades and were established in order to enable carriers serving the transpacific trade and Pacific Coast ports to compete with Gulf and Atlantic carriers and ports for cargo moving between the industrial interior of the United States and the Far East. See *Overland and OCP Rates and Absorptions*, 12 F.M.C. 184, affirmed *sub nom. The Port of New York Authority* v. *Federal Maritime Commission*, 429 F. 2d 663 (C.A. 5), certiorari denied, 401 U.S. 909. The overland rates are set in such a way that the total charges for transportation from the industrial center to the Orient via Pacific Coast ports are competitive with similar charges via Atlantic or Gulf Coast ports.

to alter the rate of such a commodity (Pet. App. 36a, 67a). Throughout the entire period, rate changes on local competitive cargo had to be made jointly (Pet. App. 34a).

Starting in 1957, Carnation Co., a large West Coast shipper of evaporated milk, made numerous requests to Pacific Westbound for a rate reduction on that commodity. Because more than 70 percent of evaporated milk moved through Pacific Westbound's local territory each year, the commodity qualified for that conference's initiative list (Pet. App. 36a-37a). Although Pacific Westbound expressed a willingness to reduce the rate and persisted in its efforts to obtain Far East's concurrence, Far East, which was moving only 10 percent or less of the volume of evaporated milk, refused because it sought to protect the revenue of its members on another commodity.[8] It was only after the Commission investigation, during the course of which petitioners' concurrence and initiative procedures first came to light, that Far East acceded to a rate reduction (Pet. App. 37a).[9]

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[8] A rate reduction on evaporated milk would have strengthened the hand of a large East Coast shipper, which had demanded an equivalent reduction of the rate on powdered milk (Pet. App. 37a).

[9] The conferences were pledged to confidentiality concerning their handling of requests for rate changes and never made public their agreements concerning initiative and concurrence procedures; the memoranda of agreements which they sent to the Commission were "somewhat abbreviated" (Pet. App. 15a). When Carnation learned of these agreements it filed a private treble damage antitrust suit against the conferences. See *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213.

On these facts, the Commission's hearing examiner concluded that petitioners' additional but unfiled agreements should have been filed with the Commission for approval under Section 15 (Pet. App. 30a). He further held that the petitioners, in implementing their additional agreements, had subjected Carnation to undue prejudice and disadvantage, in violation of Section 16 of the Act (Pet. App. 36a).

On exceptions, the Commission sustained its examiner and ordered the conferences to cease and desist (Pet. App. 69a).[10] It rejected petitioners' contention that the additional agreements were within the contemplation of Agreement No. 8200 (Pet. App. 30a), ruling that agreements dealing with initiative lists, concurrence procedures and maintenance of overland-rate differentials "were not routine, day-to-day arrangements" under the approved agreement,[11] and

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[10] On August 13, 1965, the Commission ordered a separate investigation into the lawfulness of overland rates maintained by Pacific Westbound and other conferences serving the Pacific Coast. The Commission held that the independent setting of these rates was lawful in *Overland and OCP Rates and Absorptions*, 12 F.M.C. 184; the court of appeals upheld the Commission in *Port of New York Authority* v. *Federal Maritime Commission*, 429 F. 2d 663 (C.A. 5), certiorari denied, 401 U.S. 909.

[11] The Commission relied on its earlier decisions under Section 15 involving application of the "routine action" doctrine. See *Ex parte 4, Section 15 Inquiry*, 1 U.S.S.B. 121; *Mitsui Steamship Co.* v. *Anglo Canadian Shipping Co.*, 5 F.M.B. 74; *Associated-Banning Co.* v. *Matson Navigation Co.*, 5 F.M.B. 432; and *Pacific Coast Port Equalization Rule*, 7 F.M.C. 623, affirmed *sub nom. American Export & Isbrandtsen Lines* v. *Federal Maritime Commission*, 334 F. 2d 185.

thus they should have been filed separately for scrutiny and approval under Section 15 (Pet. App. 31a). The Commission further found, as an alternative basis for requiring Section 15 approval of the supplementary agreements, that the arrangements they prescribed were not set forth in sufficient detail in Agreement No. 8200 so that "[a]ny interested party [would] be able, by a reading of the agreement [on file with the Commission], to ascertain how the agreement is to work, without resort to inquiries of the parties or an investigation by the Commission" (Pet. App. 32a). The examiner's conclusion that petitioners had subjected Carnation Co. to undue prejudice and disadvantage, in violation of Section 16 of the Shipping Act (Pet. App. 41a), was also sustained.[12]

Far East filed a petition with the Commission, seeking clarification of the extent, if any, to which petitioners could act together in the future with respect to rates. The Commission, in denying the petition, stated that Agreement No. 8200 did not sanction any joint rate-making action (Pet. App. 5a; P.R. 174-177).

Petitioners then filed a petition for review in the Ninth Circuit Court of Appeals. The petition was

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[12] The Commission rejected (Pet. App. 33a) petitioners' argument that it was estopped to deny approval of the additional agreements because of its alleged tacit approval of them. The Commission observed that the tacit approval doctrine had been rejected in *Kempner* v. *Federal Maritime Commission*, 313 F. 2d 586 (C.A.D.C.), certiorari denied *sub nom. Gulf/Mediterranean Ports Conference* v. *Federal Maritime Commission*, 375 U.S. 813.

transferred to the Fifth Circuit on the Commission's motion (Pet. App. 2a n. 1), and that court sustained the Commission's ruling as to the supplementary agreements on the ground that they could not be deemed to provide for merely routine interstitial rate adjustments; it stated that they "were significant agreements between two competitive conferences relative to ratemaking, conferring to each the power of veto over the rates of the other" (Pet. App. 14a).[13] They thus "were not contemplated by the plain language of Agreement No. 8200," the court below concluded, "and * * * they could not be lawfully entered into without prior Section 15 filing and approval of the Commission" (Pet. App. 14a).[14] At the same time, however, the court of appeals, looking to the language of Agreement No. 8200, reversed the Commission's subsequent holding, on Far East's clarification petition, to the effect that Agreement No. 8200 permitted

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[13] The court of appeals pointed out that the supplementary agreements also unlawfully affected the separate organic conference agreements of each petitioner, since the veto power conferred by the supplementary agreements enabled one conference to prevent members of the other from setting rates on their own, which their organic agreement empowered them to do (Pet. App. 14a-15a).

[14] The court below affirmed the Commission's rejection of the conferences' argument of administrative estoppel, relying both on the *Kempner* case (*supra*, n. 12) and on the scanty nature of the information provided by petitioners to the Commission (Pet. App. 15a). In addition, it affirmed the Commission's determination that petitioners had discriminated against Carnation Co. in violation of Section 16 of the Shipping Act (Pet. App. 21a).

no joint ratemaking by the conferences in the future (Pet. App. 17a).[15]

## ARGUMENT

1. Petitioners object here (Pet. 8-10) only to the fact that the Commission, in reaching the conclusion that their additional agreements were not within the compass of Agreement No. 8200, articulated a legal standard "not articulated in past cases" (Pet. App. 32a).[16] They contend, not that this new standard

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[15] In a companion case, a group of Gulf and Atlantic ports sought review of the same Commission decision, claiming that the Commission had erred in not ordering Pacific Westbound to cancel its overland rate tariff until it had received Commission approval. The court of appeals in an opinion delivered on the same day as its opinion in the case at bar affirmed the Commission. *Board of Commissioners of the Port of New Orleans* v. *Federal Maritime Commission*, 440 F. 2d 1312 (C.A. 5).

[16] Petitioners have apparently abandoned their twice-rejected argument that the Commission was estopped from denying that it approved the additional agreements. Nonetheless, petitioners suggest that they kept the Commission fully informed of their additional agreements (Pet. 5, 8). This is neither accurate nor relevant. In fact, the conferences treated their additional ratemaking agreements as a matter of strict confidence (Pet. App. 15a). The information they sent the Commission was no more than abstracts of minutes of meetings (Pet. App. 33a). And, as the court stated: "* * * the public and the Commission were not informed of the manner in which these supplementary agreements were being carried out" (Pet. App. 15a). Furthermore, petitioners never sought Section 15 approval of these agreements, and, in view of the invalidity of the doctrine of tacit approval, can claim neither approval nor administrative estoppel. See *Kempner* v. *Federal Maritime Commission, supra.*

was impermissible as a matter of law, but only that its application in the present case was premature and failed to satisfy the rule-making procedures under the Administrative Procedure Act (5 U.S.C. (1970 ed.) 552, 553).

Even assuming *arguendo* that this argument has merit, petitioners are entitled to no relief in the circumstances of this case. For, while the Commission applied a new standard—*i.e.*, whether the agreement on file adequately details the arrangements and procedures of the concerted activity petitioners engaged in—which petitioners were unable to meet, the Commission did not rest its conclusion that the supplementary agreements were in violation of Section 15 of the Act on that ground alone.

In the alternative, the Commission held that the additional agreements were not within the scope of Agreement No. 8200 because these supplementary agreements "* * * were not routine, day-to-day arrangements * * *". properly implementing petitioners' rate-making authority under the initial agreement (Pet. App. 31a). This is an application of the traditional standard used by the Commission in resolving questions of this nature. Section 15 requires carriers to file with the Commission, *inter alia*, "every agreement" fixing rates, giving privileges, or controlling competition. The *Alexander Report*,[17] which contained the recommendations that were ultimately adopted by the

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[17] House Committee on the Merchant Marine and Fisheries, *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, H. Doc. No. 805, 63d Cong., 2d Sess. ("*Alexander Report*").

House and Senate reports on the Shipping Act of 1916,[18] stressed that mandatory filing would put an end to secrecy and would require carriers to bring their agreements out into the open and thus inform the public of what joint action they were taking. *Alexander Report, supra,* at 293-295, 311-313. Not long after passage of the Shipping Act, the United States Shipping Board (predecessor to the Commission) held that, to effectuate the purpose of the statute, all agreements of the kind set forth in Section 15 must be filed with the Commission, unless they could be categorized as "routine." *Ex Parte 4, Section 15, Inquiry,* 1 U.S.S.B. 121. Later decisions, both of the Commission and of the courts, have adhered to that principle, while at the same time narrowing the scope of what is routine. *Pacific Coast European Conference,* 4 F.M.B. 696, 702-703; *Associated-Banning Co.* v. *Matson Navigation Co.,* 5 F.M.B. 336, 342; *Pacific Coast Port Equalization Rule,* 7 F.M.C. 623, affirmed *sub nom. American Export & Isbrandtsen Lines* v. *Federal Maritime Commission,* 334 F. 2d 185 (C.A. 9); see also *Isbrandtsen Co., Inc.* v. *United States,* 211 F. 2d 51 (C.A.D.C.), certiorari denied *sub nom. Japan-Atlantic and Gulf Conference* v. *United States,* 347 U.S. 990.

It was, therefore, entirely proper for the Commission to apply the "routine action" standard to determine the validity of the supplementary agreements under Section 15. In so doing, it correctly concluded

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[18] See *Volkswagenwerk* v. *Federal Maritime Commission,* 390 U.S. 261, 276, n. 25.

that these significant, yet unfiled, agreements were not routine under existing Agreement No. 8200 (Pet. App. 32a, 53a). The court below agreed, declaring that the practical effect of the additional agreements was to give "each conference * * * veto power over the rates of the other" (Pet. App. 16a). Petitioners do not contest those rulings in this Court.

Accordingly, the fact that the Commission also found, in the alternative, that Section 15 had been violated by petitioners' failure to set out in adequate detail in the agreement on file—Agreement No. 8200—the procedures and arrangements contemplated by the supplementary agreements, is of no consequence in this case. While that ruling was concededly based on a standard "not articulated in past cases" (Pet. App. 32a), [19] the Commission was careful to point out in applying it here that "[t]his is not to say that we are limiting the scope of 'routine actions' which need not be the subject of section 15 filings; we are merely giving purpose to the requirements of the section" *(ibid.)*. Since it had already determined that the unfiled concurrence, initiative and overland-rate agreements were not routine—a determination not challenged in this petition—the Commission's alternative basis for invalidating those additional agreements under Section 15 was not needed. Nor was it relied upon by the court of appeals, which affirmed the cease and desist order only on the ground that

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[19] The Commission has since promulgated regulations, 46 C.F.R. Part 537, setting forth the detailed information that must be incorporated in conference and other agreements.

"the supplementary agreements were not incidental to or implementation of the basic conference agreement, and were certainly not routine * * *" (Pet. App. 16a).[20] There thus is no basis for petitioners'

[20] The court of appeals disagreed with the Commission's separate ruling that Agreement No. 8200 permitted no joint ratemaking by petitioners. It is argued that this reversal on the interpretation of the initial agreement required the Fifth Circuit to remand the case to the Commission for reconsideration of the question whether the supplementary agreements were "routine" under Agreement No. 8200, as so interpreted. A remand was plainly unnecessary in this case. Whatever the proper interpretation of Agreement No. 8200, it is evident that the Commission had already determined that petitioners' concurrence, initiative and overland-rate agreements were in any event not of a routine nature. In the case growing out of, and related to, the instant litigation (*Overland and OCP Rates and Absorptions, supra*, 12 F.M.C. at 213), decided prior to the decision at bar by the court of appeals (see n. 10, *supra*), the Commission explained this aspect of its ruling as follows: "* * * [Agreement 8200] was one between two conferences in different competitive trades; *although they were authorized to meet and agree upon the establishment or change of rates,* it was found that such authority did not cover a system of 'concurrences' and 'initiative items' under which one conference in effect surrendered its right even to initiate consideration of certain rate changes without the prior concurrence of the other. *This was hardly within the contemplation of ordinary rate-making procedure.*" (Emphasis added.) Thus, the Commission, in applying the "routine action" standard in the instant case, considered the supplementary agreements to be invalid even assuming that Agreement No. 8200 "authorized [petitioners] to meet and agree upon the establishment or change of rates." The court of appeals, having before it all the agreements in question, could properly find that the administrative record fully supported the Commission's conclusion in this regard. Thus, to the extent petitioners' citation of *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, is at all apposite to this

claim of prejudice.

2. Contrary to petitioners' argument (Pet. 12-13), there is no inconsistency between the decision below and the recent decision by the Fifth Circuit in *Port of New York Authority* v. *Federal Maritime Commission*, 429 F. 2d 663 (C.A. 5), certiorari denied, 401 U.S. 909.

In the *Port of New York* case, the court affirmed the Commission's ruling that an independent setting of overland rates by conferences serving the Pacific Coast, including Pacific Westbound, was within the scope of the ratemaking authority provided for in each of the approved conference agreements there involved. *Id.* at 668. The rationale was that overland rates and the absorption practices incidental to them, procompetitive in purpose and effect, were the well-established norm in the transpacific trade even before the passage of the Shipping Act and so "* * * such rates and practices constituted no more than routine rate making." *Id.* at 668.

In this case, by contrast, the unfiled, additional agreements were between two competing conferences and they inaugurated a system under which the relationship of the overland rates of one conference and the corresponding rates of the other was to be maintained; in addition, one conference in effect surrendered its right even to initiate consideration of certain rate changes without the advance concurrence

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case, that decision seems to support the court of appeals' affirmance of the cease and desist order, rather than to suggest, as petitioners apparently contend, that the case should have been remanded.

of the other. These agreements, then, by their very nature "were not incidental to or [in] implementation of the basic conference agreement [No. 8200], and were certainly not routine * * *" (Pet. App. 16a).

Clearly, the practices in *Port of New York* differ both in economic impact and historical background. As the court of appeals stated in a companion case to this, which involved Pacific Westbound's overland rates (*Board of Commissioners of the Port of New Orleans* v. *Federal Maritime Commission*, 440 F. 2d 1312, 1318 (C.A. 5)):

> We see no inconsistency insofar as the Commission rejected the concerted activities of two competitive conferences, one a Pacific Coast, the other an Atlantic Coast Conference, in regard to a supplementary agreement respecting overland rates, for failure to have prior Section 15 approval of the Commission, but accepted without such approval the vastly different practice—historically of long duration—of the several Pacific Coast conferences in establishing and using overland tariffs. We agree with the Commission's findings that overland rate-making within a single conference was routine whereas concerted collaboration between the two conferences in this regard was not.

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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